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SUPREME COURT OF THE UNITED STATES.

REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE and ENGINEERING TIMBER COMPANY, LTD., *Petitioners (Claimants-Appellees below)*, **against** FRENCH OVERSEAS CORPORATION, as owner of the schooner *Malcolm Baxter, Jr.*, *Respondent (Petitioner-Appellant below)*.	No. October Term, 1927.
IN THE MATTER *of* The petition of FRENCH OVERSEAS CORPORATION, as owner of the schooner *Malcolm Baxter, Jr.*, for limitation of liability.	

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Republic of France, Compagnie Franco-Indo-Chinoise and Engineering Timber Company, Ltd., respectfully show to this court as follows:

I. The Situation in the Lower Courts.

A.

This is a petition for *certiorari* by claimants in a limitation of liability proceeding who were all shippers of cargo on board the American schooner *Malcolm Baxter, Jr.*

The writ of *certiorari* is sought to review a final decision in admiralty of the Circuit Court of Appeals for the Second Circuit (R. 1165-1171), which modified the decision of the United States District Court for the Southern District of New York, rendered by Judge Knox (R. 301-313).

The case is not officially reported. The opinion of the Circuit Court of Appeals by Judge Campbell is reported in 1927 American Maritime Cases 1053.

The Courts below have finally disposed of all questions of fact in favor of the petitioners.

As to the legal results flowing from those facts the Courts below have differed.

The case is now brought here to correct what your petitioners believe to be serious errors of law in the decision of the said Circuit Court of Appeals.

The principal questions of law involved are of the greatest importance and interest to ocean borne commerce. They are as follows:

1. Whether a breach of the warranty of seaworthiness on sailing, so flagrant as to force both Courts below to refuse to allow the shipowner to limit his liability, has any

effect on bill of lading clauses in favor of the ship owner, such as the clause allowing him to retain prepaid freight?

The Court of Appeals held that the shipowner might retain his freight under the bill of lading notwithstanding he was in privity with unseaworthiness which caused the end of the adventure.

2. Whether a deviation due wholly to such initial unseaworthiness is excusable as an involuntary deviation?

The Court of Appeals held that a deviation due to an initial unseaworthiness to which the shipowner was in privity was "an involuntary deviation".

3. Whether the doctrine of frustration of adventure by "Restraint of Princes" may be invoked by a party to a contract whose breach of the essential warranty of seaworthiness was the proximate cause of bringing the vessel within the operation of the restraint?

The Court of Appeals held the shipowner might invoke the equitable defense of frustration notwithstanding the fact that the initial unseaworthiness, with which the shipowner was in privity was the sole cause of bringing the vessel within the "restraint".

Your petitioners believe that the Circuit Court of Appeals for the Second Circuit has decided these important questions of law wrongly, and in conflict with the decisions of this Court and with fundamental principles of maritime law of far reaching importance.

B.

Upon libels being filed by your petitioners against the schooner *Malcolm Baxter, Jr.*, to recover damages resulting from the schooner's failure to perform the contract voyage from New Orleans, Louisiana, to Bordeaux, France, in the latter part of 1917, the respondent, French Overseas Corporation, owner of the schooner *Malcolm Baxter, Jr.*, filed a petition for limitation of and exoneration from liability and enjoined further proceedings under the libels.

The libelants filed claims in this limitation proceeding in substance similar to their libels, claiming damages on the ground that the voyage was abandoned by reason of the schooner's unseaworthiness on sailing and her structural incapability to perform the contract voyage. They also filed answers setting up the same facts as a ground why limitation of and exoneration from liability should be denied.

C.

The facts are as follows:

The schooner *Malcolm Baxter, Jr.*, loaded her cargo at New Orleans in July and August, 1917 (R. fols. 769, 773).

The petitioners were the owners and consignees of practically the entire cargo of the schooner, as follows:

Republic of France, 617 steel billets; 455 hogsheads of tobacco;

Compagnie Franco-Indo-Chinoise, 4076 bags malt; 4000 bags of cornstarch;

Engineering Timber Company, Ltd., 12991 pieces of spruce lumber.

For these goods the schooner issued clean bills of lading for carriage from New Orleans to Bordeaux (R. pp. 221-224), which contained the following provision:

> "Also that freight prepaid will not be returned goods lost or not lost. Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by vessel's owner, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere * * *" (R. pp. 221-224, fol. 904).

Upon shipment of the cargo, these petitioners paid the following freight:

Republic of France	$40,224.30
Compagnie Franco-Indo-Chinoise	57,723.20
Engineering Timber Company, Ltd.	11,706.68

(R. fols. 2444, 2450, 2453, 2531).

Both of the lower courts have found that, before the voyage commenced, the *Malcolm Baxter, Jr.*, was so structurally defective and so unseaworthy as to be incapable of performing the voyage without extensive repairs; that her defective and unseaworthy condition was discoverable by the exercise of due diligence; and that the French Overseas Corporation, as owner of the schooner, failed to exercise due diligence, or to make any attempt to discover the vessel's condition before she broke ground for the voyage. (R. pp. 307, 310, 1167, 1168).

The evidence shows, and the District Court found, that the schooner's owner never made any attempt to ascertain her condition before loading the cargo and commencing the voyage (R. fols. 573, 308, 309, 118, 148, 127).

Both of the lower courts have held that the French Overseas Corporation, as owner of the schooner, was inexcusably guilty of a breach of the warranty of the vessel's seaworthiness (R. pp. 310, 1168).

The schooner left New Orleans on August 16, 1917, and was towed down to Port Eads, at the mouth of the Mississippi River (R. fols. 826, 827).

On arrival at Port Eads, her master discovered that the schooner had already developed a steady leak in the forward end of the vessel; and he realized then that the schooner was unseaworthy (R. fols. 774, 775).

The schooner did not sail from Port Eads until August 23, 1917, and her master then sailed out into the Gulf, expecting that it would be necessary to put into some Gulf or Atlantic Coast port for repairs (R. fols. 775-779).

Three days later, although the schooner had encountered weather so calm that she had barely made steerage way, the leak increased to such serious proportions that her master subsequently put into the port of Key West (R. fols. 784, 827-834, 783).

The Board of Survey which examined the schooner at Key West reported that she was incapable of proceeding on the voyage without extensive repairs. (Exhibit D, R. pp. 232-235; Exhibit B, R. p. 294); and recommended that the schooner be towed to an Atlantic Coast port for repairs. The owner, contrary to that recommendation, had the vessel towed to Havana, Cuba, where she arrived on September 23, 1927 (R. fol. 682).

The schooner was subsequently drydocked and examined at Havana, and the surveyors there reported that the schooner was unable to proceed on the voyage without extensive repairs (Exhibit H, R. pp. 239-241).

The structural defects found at Key West and Havana must have existed before the voyage commenced, because there is no evidence to account for their causation at any later time. Indeed, the Circuit Court of Appeals held, at the outset of Judge Campbell's opinion, that the schooner "was unseaworthy when she left New Orleans" (R. p. 1168).

Repairs were carried on over a period of about four months at Havana, and the schooner was not able to reattempt the voyage at least until January 14, 1918 (R. fols. 636-7, 683).

Both of the lower courts have found that in the interim the United States government, *on September 28, 1917*, issued an order forbidding the clearance of any sailing vessel for

a voyage through the submarine zone (R. pp. 302, 311, 1167).*

Upon the completion of repairs at Havana, *no application* for a clearance was made on behalf of the schooner *Malcolm Baxter, Jr.* (R. fol. 262). Her owner, French Overseas Corporation, merely notified the several shippers of cargo that the vessel would return to New York and redeliver the cargo there, and that was subsequently done (R. fols. 135, 690).

After the *Malcolm Baxter, Jr.*, had delivered the cargo to the shippers at New York, it was found that some of the shipments had received damage while on board the schooner, and the shippers incurred expenses for the reconditioning of that damage.

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* Exports Administrative Board

1435 K Street, N. W.

September 28, 1917

No Licenses for Any Proposed Shipments for Sailing Vessels Going Through the War Zone.

The Exports Administrative Board, in accordance with requests made by the United States Shipping Board and by the Navy Department has instructed the Director of the Bureau of Export Licenses not to grant licenses for any proposed shipments by sailing vessels going through the war zone. It is, of course, obvious that steamers can navigate the war zone with less danger than slow sailing craft, and sailing ships, if used in safer waters, would to an extent release steam vessels now used in such waters.

The attention of shippers is, therefore, called to the fact that clearance will be refused sailing vessels destined to proceed through the war zone regardless of the fact that the goods themselves may have already been licensed. Licenses will be granted in the future for shipments to European countries only on condition that the goods are to be shipped by some vessel other than a sailing vessel. The Board will revoke licenses covering goods to be shipped through the war zone if any shippers attempt to ship them by sailing vessel (R. p. 206).

Before the cargo was returned to the shippers, the owner of the schooner made a demand upon the shippers for deposits to cover general average contributions to the alleged sacrifices and expenses of the schooner while in the ports of refuge of Key West and Havana, and certain of the shippers actually made the deposits so demanded (R. fols. 988-990, 999, 1005, 1010, 1011).

Some consignments of the cargo were forwarded by steamer from New York to Bordeaux, at a rate of freight in excess of that originally paid to the schooner. Efforts to forward the balance of the cargo were unsuccessful and it was disposed of in this country for the best price obtainable (R. fols. 2279, 2280, 2281, 2284-5, 2294, 2298, 2300, 2396, 2407).

D.

The District Court, after a careful examination of all the testimony offered found:

a. that the evidence showed beyond dispute that the schooner was structurally defective and unseaworthy when the voyage commenced, so that she was incapable of performing the contract voyage (R. fols. 919-920, 935);

b. that the schooner's structural defects and incapability of performing the voyage could have been discovered, had the owner or its representatives made any effort to discover them (R. fols. 929, 930);

c. that the owner failed to make any effort to discover the condition of the vessel before the voyage commenced (R. fols. 922, 929);

d. that the owner was guilty of a breach of the warranty of seaworthiness (R. fols. 919, 934);

e. that the departure from the voyage by the schooner when she put into Key West and Havana was a direct consequence of her original unseaworthy and defective condition (R. fols. 932-936);

f. that "at no time prior to September 28, 1917, the date upon which the governmental embargo went into effect, was the *Baxter* ready, able and willing to perform her contract" (R. fol. 933);

g. that the proximate and continuing cause of the abandonment of the adventure was the owner's original breach of warranty of seaworthiness, in failing to provide a vessel capable of performing the voyage (R. fols. 935-6); and

h. that, by reason of the foregoing facts, the owner of the *Malcolm Baxter, Jr.*, was responsible to the cargo owners for the entire damages sustained by the latter, including the return of the prepaid freight, without any right on the part of the owner of the schooner to limit liability (R. fol. 936).

E.

On appeal by the owner of the schooner to the Circuit Court of Appeals for the Second Circuit, the latter court *affirmed* the findings of the District Court:

a. that the schooner was unseaworthy before the commencement of the voyage (R. p. 1168);

b. that her unseaworthiness was discoverable *before* the commencement of the voyage, by the exercise of due diligence (R. p. 1168);

c. that the owner had failed to exercise due diligence to discover the vessel's unseaworthiness (R. p. 1168);

d. that the owner of the schooner was not entitled to limitation of liability (R. p. 1168); and

e. that the owner of the schooner, having been guilty of a breach of the warranty of seaworthiness, should respond to the cargo owners for the damages resulting from that breach (R. p. 1168).

On the question of liability, and the right to limit liability, the French Overseas Corporation, as owner of the schooner, *was unsuccessful in both the lower courts.*

The Circuit Court of Appeals, however, held that although the vessel was unseaworthy when she left New Orleans and the owner could have discovered that fact by the exercise of due diligence, there was no deviation. In

spite of the decision of this court in *The Willdomino* (1927), 272 U. S. 718, 727, that a departure from a contract voyage cannot be excused by an emergency arising out of "gross negligence," the Circuit Court of Appeals sought to make the following distinction:

> "If the circumstances under which the ship leaves port are such that it must be known that she will be compelled to deviate, e. g., a shortage of fuel, the deviation is voluntary. If, however, the ship leaves port unseaworthy, which includes one badly stowed, even if it was known, she does not voluntarily deviate if she seeks a port of refuge" (R. p. 1170).

The Circuit Court of Appeals, moreover, ruled that the governmental order of September 28, 1917, was the effective cause of the frustration of the voyage and that, therefore, the cargo owners should not recover any damages resulting from the vessel's abandonment of the voyage, nor receive any refund of the freight which they had prepaid to the *Malcolm Baxter, Jr.*, on the faith of the owner's warranty of seaworthiness (R. p. 1171).

A petition by the cargo owners to the Circuit Court of Appeals for the Second Circuit for re-argument was denied, although that court in denying that petition clarified its original ruling to the extent of damages recoverable, on account of the breach of the warranty of seaworthiness, and left to the District Court the disposition of the costs in that court (R. p. 1191).

The result of this modification by the Circuit Court of Appeals of the damages recoverable by the cargo owners

is to relieve the owner of the *Malcolm Baxter, Jr.*, from the greater part of the damages sustained by the cargo and to reduce the cargo's recovery from $391,741.26, including interest, to an amount not yet fixed but which is likely to be about one-fourth of that sum.

The decision of the Circuit Court of Appeals permits the shipowner to retain the prepaid freight amounting to $109,654.18 (R. pp. 221-224) notwithstanding that the schooner because of unseaworthiness was always wholly incapable of making the voyage for which the freight was paid.

Your petitioners respectfully submit that the decision of the District Court herein was sound in law and should have been affirmed in all respects by the Circuit Court of Appeals.

They further submit that the decision of the Circuit Court of Appeals is contrary to decisions of this honorable court, is contrary to sound established principles of the maritime law of this country, and is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *The Henry W. Cramp* (Appendix to Petition).

II. The Questions Presented.

A. Can an owner who is not entitled to limit its liability because it is privy to the unseaworthiness of the vessel, nevertheless rely on provisions of the special contract of the bill of lading?

Although the Circuit Court of Appeals held the shipowner, because of its culpable failure to perform its war-

ranty of seaworthiness, not entitled to limit its liability, the court nevertheless held the shipowner entitled to rely on the defense of restraints of princes and also on the prepaid freight clause of the bill of lading. It is submitted that in this respect the decision is unsound and inconsistent with the doctrine laid down by this court in *Allanwilde Transp. Corp.* v. *Vacuum Oil Co.*, 1919, 248 U. S. 377; *The Gracie D. Chambers*, 1919, 248 U. S. 387, and *The Bris*, 1919, 248 U. S. 392. Those decisions rested expressly on the condition that the shipowner came into court with clean hands.

B. May a shipowner who has breached a fundamental condition of the contract of carriage on its part, by failing to furnish a vessel seaworthy and capable of performing the voyage, retain the prepaid freight?

A shipowner who fails to carry cargo to destination is not entitled to retain prepaid freight, except upon a special agreement to the contrary with the cargo in the contract of carriage.

The Circuit Court of Appeals held that the owner of the *Malcolm Baxter, Jr.*, was entitled to retain the prepaid freight under the contractual provisions of the bills of lading, in spite of its finding that the owner had breached the warranty of seaworthiness which formed the very basis of the agreement on which the cargo owners parted with their freight money.

C. Does the departure of a vessel in a condition of known unseaworthiness, such as to make her incapable of performing the voyage at least without extensive repairs, constitute a deviation?

The Circuit Court of Appeals has held that it does not; and seeking to rely on *Kish* v. *Taylor* [1912] A. C. 604, has drawn a distinction between a deviation necessitated by shortage of fuel and a deviation necessitated by structural incapability of performing the voyage, which it is submitted is unsound and in conflict with the decision of this court in *The Willdomino* (1927), 272 U. S. 718.

The Circuit Court of Appeals went so far as to hold that the owner's complete disregard of its obligation to furnish a seaworthy vessel or to use due diligence to attempt to make the vessel seaworthy did not amount to gross negligence within the rule of this court in *The Willdomino* (1927), 272 U. S. 718.

D. Was the abandonment of the voyage proximately caused by the vessel's unseaworthiness which continued as an active operating agency at least until January 14, 1918?

The Circuit Court of Appeals has held that the alleged governmental embargo rendered sailing illegal, frustrated the adventure and excused the shipowner from performance. This conclusion was rested on the ground that the *embargo* was not the result of the *unseaworthiness* of the ship (R. pp. 1170-1171); whereas the real question presented is whether the *abandonment of the contract voyage* was the result of the *unseaworthiness* of the ship. The court's reasoning disregards the undisputed fact that the unseaworthiness of the vessel brought her within the operation of the embargo, which otherwise would not have entered into the situation at all.

III. Reasons for Granting This Application.

It is respectfully submitted that this court should take up this case on *certiorari*, set aside the decision of the Circuit Court of Appeals, and restore the decision and decree of the District Court on the following grounds:

A. The Circuit Court of Appeals has wrongly decided an important question concerning deviation in a way which is in conflict with the decisions of this court in *The Walldomino* (1927), 272 U. S. 718; *St. Johns N. F. Shipping Corp.* v. *Companhia Geral Commercial do Rio De Janeiro*, 1923, 263 U. S. 119, 124.

It is also in direct conflict with the principles announced by the Circuit Court of Appeals for the Third Circuit in a recent and as yet unreported case, *The Henry W. Cramp* v. *Rosasco*, which is printed as an appendix hereto.

B. The Circuit Court of Appeals has wrongly decided an important question of maritime law concerning proximate cause in a way which is in conflict with the decisions of this court in *The G. R. Booth* (1898), 171 U. S. 450; *U. S.* v. *Hall* (1810), 6 Cranch 171; *The Caledonia* (1894), 157 U. S. 24, and with the decision of The Circuit Court of Appeals for the Third Circuit in *The Henry W. Cramp, supra.*

C. The effect of initial unseaworthiness of the vessel on the special contract of the bill of lading generally and on the prepaid freight clause in particular, is an important question of maritime law which has never been, but should be, settled by this court. For a shipowner certainly should

not be allowed to collect freight and then knowingly send an unseaworthy ship to sea, and retain the freight after the ship is lost or the adventure ended owing to the unseaworthiness.

D. All the questions herein presented are of great commercial importance to shippers, underwriters, shipowners, and all others concerned in sea borne commerce. The decision of the Circuit Court of Appeals on all of these questions appears to be in conflict with the weight of authority and with the fundamental principles of maritime law laid down by this court.

IV. Accompanying Documents.

A certified copy of the transcript of the record of the proceedings of the District Court and Circuit Court of Appeals is presented herewith.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court on a day to be designated for its review and determination, a full and complete transcript of the record and of all proceedings in the said Circuit Court of Appeals had in said cause, entitled in that court "In the Matter of the petition of French Overseas Corporation, owner of the Schooner *Malcolm Baxter, Jr.*, for limitation of liability, French Overseas Corporation and Maryland Casualty Company, appellants, No. 361, Octo-

ber Term, 1926"; that the final order of the Circuit Court of Appeals made and entered in the said case on the 13th day of June, 1927, may be reversed and the decree of the District Court be reinstated, by this honorable court; and that your petitioners may have such other and further relief in the premises as to this honorable court may seem meet and just.

And your petitioners will ever pray, etc.,

REPUBLIC OF FRANCE,
By CHARLES K. CARPENTER,
One of Its Proctors.

COMPAGNIE FRANCO-INDO-CHINOISE,
By HARRY M. ZUCKERT,
Proctor.

ENGINEERING TIMBER COMPANY, LTD.,
By HARRY M. ZUCKERT,
Proctor.

JOHN M. WOOLSEY,
MARK W. MACLAY,
ROBERT S. ERSKINE,
HARRY M. ZUCKERT,
CHARLES K. CARPENTER,
Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CHARLES K. CARPENTER, being duly sworn, says that he is one of the counsel for the Republic of France, one of the petitioners herein; that he assisted in the preparation of the foregoing petition; and that the allegations thereof are true as he verily believes.

CHARLES K. CARPENTER.

Sworn to before me this 18th day of August, 1927.

Hamilton A. Long

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HARRY M. ZUCKERT, being duly sworn, says that he is one of the counsel for the Compagnie Franco Indo-Chinoise and the Engineering Timber Company, Ltd., petitioners herein; that he assisted in the preparation of the foregoing petition; and that the allegations thereof are true as he verily believes.

HARRY M. ZUCKERT.

Sworn to before me this 18th day of August, 1927.

Hamilton A. Long

We hereby certify that the foregoing petition in our opinion is well founded and entitled to the favorable consideration of the Court; and that it is not filed for the purpose of delay.

John M. Woolsey,
Mark W. Maclay,
Robert S. Erskine,
Charles K. Carpenter,
Harry M. Zuckert.

New York, August 18th, 1927.

APPENDIX

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 3607 March Term, 1927

Schooner *Henry W. Cramp*, Whereof
FRANCIS J. MCDONALD, is Claimant,
Appellant,

vs.

ALBERT T. ROSASCO,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before BUFFINGTON, WOOLLEY and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge.

In the Court below, Albert T. Rosasco, the holder and owner of bills of lading, filed a libel against the schooner *Henry W. Cramp*, to recover damages alleged to have accrued by reason of a breach of a charter party entered into

by the Schooner with the firm of Rosasco Brothers to carry a cargo of pine timber from Pensacola to Genoa, Italy. The libel alleged the schooner had deviated from the charter course and during the period of deviation had abandoned the cargo and thrown it back on the charterer's hands. The vessel was attached and released on a bond and was subsequently lost. The Court below heard the case and decided it on the theory, not on the deviation charged in the libel, but on the ground of a rescission, and made an award on the basis of a return of the freight and insurance premiums which had been paid by the charterers in advance. The defendant took this appeal and contends that it was not responsible and the libel should be dismissed. On the other hand the libellant contends that the true basis of decision should be that the schooner had wrongfully deviated from her chartered route. We here note that even if the contention of the libellant is correct, that as a practical thing, a decree cannot be enforced in excess of the bond and therefore, although libellant's damages might exceed the award made by the Court below, he will be given all practical possible relief by the affirmance of the decree below. Being of opinion that the contention of the libellant as to deviation is well based, we now state our grounds for so holding.

On November 1, 1916, the schooner *Henry W. Cramp* was chartered by its owners to Rosasco Brothers, a firm composed of William S. Rosasco and Albert T. Rosasco, who is the libellant in this case. The charter was for carriage of a cargo of lumber from Pensacola, Florida, to Genoa, Italy, and stipulated: "for a voyage from a safe port in the U. S. Gulf to a safe port on the West Coast of the

United Kingdom including London." Pursuant to charter the schooner arrived at Pensacola and in April or May, 1917, loaded and started on her voyage, before which she was paid in advance freight of $46,995.84, and insurance premiums of $31,842.81. Before sailing the schooner duly issued five bills of lading for the cargo of pitch pine, which bills were subsequently endorsed and negotiated by Rosasco Brothers to the Credito Italiano, a bank at Genoa, and from it bought by Albert T. Rosasco, the present libellant, who resides in Genoa.

The schooner sailed from Pensacola, the last of May but went to Norfolk, Virginia, where she landed June 27th, but the charterer did not know of her whereabouts until September, when in answer to their inquiry, they learned of it from A. D. Cummins & Company, of Philadelphia, Managing Owners of the Schooner, who as justification stated, first, that "It was found impossible at Pensacola to secure a crew to go through the war zone and we therefore had to have the vessel proceed to Norfolk to secure a crew"; second, "We are also engaged in securing war insurance on the vessel", and, third, that the captain was notified by the Collector of the Port "that the vessel could not sail on her voyage by reason of a recent ruling and regulation of the United States Shipping Board". In its reply and its several communications the charterers averred that, "This vessel cleared for Genoa, from this port, fully equipped, manned and provisioned, and there was no necessity nor right, on vessel's part, to deviate to Norfolk (Hampton Roads). If she had not gone there, there never would have been any question of a permit." During the entire after-events the charterers stood on their rights under the char-

ter party, demanded the Schooner complete her voyage and protested against her discharging her cargo.

The vessel remained at Norfolk until October 1, 1917, when she was towed to Philadelphia. Thereafter, and against the protest of the charterer, the cargo was discharged and by stipulation, without waiver of rights, was sold and at a rate that involved a heavy loss as compared with the prices in Genoa. Thereupon Albert T. Rosasco, as owner of the bills of lading, brought this libel claiming to recover as damages $154,750. On hearing, the Court below entered a decree in libellant's favor from which it took this appeal.

As we view the case two questions are involved. First, the defendant contends Albert T. Rosasco has no right of action, because he has not shown title to the bills of lading. Without discussing the proofs in detail, we may say we find this contention without merit. In accordance with their previous, long continued course of business, the firm of Rosasco Brothers, which did business at Pensacola, endorsed these bills of lading and delivered them to the Credito Italiano, a bank at Genoa, which paid them full value therefor. Subsequently, the bank endorsed and sold same to Albert T. Rosasco, who thereupon became the owner of the cargo and who under the business practice of the parties, disposed of such cargoes in Italy as he saw fit. On the non-delivery of the cargo, the latter sent his bills of lading to this country for the purpose of bringing suit and they were produced and are in evidence in this case. The evidence of William S. Rosasco, the other member of the firm, is that Albert T. Rosasco is holder and indeed the sole

owner. Under such facts the right of the latter to bring this libel is clear.

The second question involved is: Was the going of the schooner into Norfolk, Virginia, an unwarranted deviation from a charter party to proceed from Pensacola, Florida, to Genoa, Italy. In accepting the cargo at Pensacola and beginning her journey from that port in accordance with the charter, the schooner undertook that she was seaworthy (which of course included a competent crew) and that she could commence and carry out the charter voyage with reasonable diligence and without unnecessary deviation. Now, that the most direct path from Pensacola to Genoa is not by way of Norfolk and Philadelphia goes without saying, so that going to Norfolk as the schooner did the burden is upon her to show warrant therefor. This she seeks to do by proving what the customary course of sailing vessels was, namely, taking advantage of the Gulf Stream and coming up in it as far as the lattitude of Cape Henry and then turning East to Europe. From this it is contended that the distance from there to Norfolk was so small as not to constitute a deviation. With this contention we cannot agree for the adjudged cases are otherwise. In *Morrison* v. *Shaw*, 2 K. B. 783, where the voyage was from New Zealand to London, it was held a deviation to stop at Havre enroute, though this only amounted to an extra fifty-four miles on a voyage of several thousand miles. In *Ardan* v. *Theband*, 35 Fed. Rep. 620, a side trip of forty miles was held a deviation. In *Thatcher* v. *McCulloh*, 23 Fed. Cases, 891, where the route was New Orleans to New York via Havana, a going to Key West was held a deviation "though it might conduce to expedite the voyage". How firm the law is in

holding vessels to their route will be seen in *Elliott* v. *Wilson*, 4 Brown's O. Cases 470, where the House of Lords held going six miles out of the course specified was a deviation. The going into Norfolk being a deviation we find no proof of anything that justified it. Without discussing the grounds alleged and now set up, it is clear from the testimony that the stop at Norfolk was determined on, not while the vessel was at sea, or for anything there occurring, but before she left Pensacola. In that regard Cummins, one of the managers of the schooner, testified:

> "Q. Had you known when the ship left Pensacola that you could not get sailors for the ship to take her to Genoa?
>
> A. They were having all kinds of trouble to get them.
>
> Q. And you knew when the ship left Pensacola, didn't you, that you would have to go to Norfolk to complete your crew?
>
> A. We had a complete crew.
>
> Q. Well, to replace your crew?
>
> A. No.
>
> • • • • • •
>
> A. Just previous to the vessel sailing I was advised by the master that it was impossible to secure a crew to go to Genoa.
>
> Q. From Pensacola?
>
> A. Yes. I told him if he couldn't get a crew to go to Genoa to ship a crew as far as Norfolk and we would see what we could do there.
>
> Q. And that is what he did?
>
> A. He shipped them for Genoa. We have the articles from the United States Commissioner.
>
> Q. But he did come to Norfolk?
>
> A. Yes.

Q. And this letter of September 4th correctly states your understanding of the matter?

A. And I always thought up until lately that he had shipped the crew for Norfolk.

Q. You had intended then from the start, so far as you were concerned, to go into Norfolk?

A. Not to hold the vessel at Pensacola; to get her out of the Gulf on her way.

Q. And to go up to Norfolk?

A. On her way, yes, sir.

Q. That is to Norfolk?

A. Yes."

It is unfortunate for the Schooner that the master is dead, by reason of there being no proof by him, and that no one on board the vessel could be found, in spite of search, to prove any of the acts necessitating the vessel seeking harbor at Norfolk, but the failure of the vessel to give any notice of her going to Norfolk and remaining there more than two months without informing the charterers, and doing so then only on inquiry by the charterers, is a course of unexplained conduct not calculated to inspire confidence in the alleged purpose of the vessel to complete this contract of affreightment, the risks and expense of which had, by the entry of the United States into war, been largely increased from the time it was made. Seeing then the schooner unwarrantably deviated from her course, it necessarily follows that her coming within the Governmental embargo was solely a sequence of her deviation and if, as we assume for present purposes, such restraint prevented her from making the voyage, it was a barrier which she herself wrongfully raised and which therefore she cannot set up as an excuse for non-compliance with her charter obligation. We here note that the trial Judge reached the

same conclusion and was of opinion that the charterers then had a right to stand on their contract rights and claim damages but that they elected not to do so. In that regard he said:

> "Let us interrupt the recital of events by taking a survey of the situation of the parties at this time in order to get an appraisal of their respective rights. Assuming the going into the harbor of Norfolk was a deviation from the proper course of the charter party voyage, this was a breach of the contract by vessel and gave to the other party the clear right to declare the breach and claim damages for the broken contract. The libellants had the further and equally clear right however to waive the default, refuse to accept a breach and to insist upon performance of the contract. They elected to pursue this latter course. It becomes then of no importance to inquire whether there was a deviation or not."

But in our judgment this conclusion was not justified by the proofs. In the first place the charterers were kept in ignorance of the deviation until September following and remained under the justified impression the vessel was on her way to Genoa. As soon as they learned of the true situation and through the months following they stood on the rights accruing to them by reason of the deviation. Finding the vessel had deviated they did what they could to help the schooner extricate herself from the plight she had brought on herself, and we find clear proof of their consistently and unequivocally standing on the rights created by the deviation and no evidence of their abandoning or waiving such rights. Without reciting all the letters and telegrams evidencing their consistently standing on the rights accruing by reason of the deviation we select as illus-

trative of their position their telegrams of September 12th which states, "Replying to your letter fourth, without prejudice to our rights or those of holders of bills of lading we will aid get permit provided vessel goes forward. We cannot consent to discharge of cargo, but must insist on performance." "September 18th. When you agree for ship that our co-operation shall be without prejudice to any rights we or holders of bills of lading have against ship. Can we co-operate. We are advised ship had no right to go to Norfolk." "September 14th. We shall expect vessel to prosecute and complete voyage, in fulfillment of C/P and B L and under no consideration can we consent to discharge of cargo anywhere except in Genoa, Italy". "September 24th. We do not want any litigation, as you may recollect, and are desirious that the ship sail, but we do not propose, if any rights have accrued to us by vessel's going to Norfolk (Hampton Roads) instead of Genoa, to waive such rights. This vessel cleared for Genoa, from this port, fully equipped, manned and provisioned, and there was no necessity nor right, on vessel's part, to deviate to Norfolk (Hampton Roads). If she had not gone there, there never would have been any question of a permit; however, as before stated, we shall be only too glad, without prejudice, to co-operate in getting the permit. If our co-operation, on these conditions, is satisfactory, please wire us."

In October the schooner was moved to Philadelphia and what followed is testified to by William T. Rosasco and is not contradicted:

"Q. Did the vessel remain in Norfolk or what did she do? Did she proceed from Norfolk to Genoa?

A. No, sir.

Q. Where did she go?

A. She came to Philadelphia.

Q. Did you have anything to do with her coming to Philadelphia?

A. Not a thing.

Q. Did you have anything to do with her going to Norfolk?

A. Not a thing.

Q. When she came to Philadelphia did she proceed from Philadelphia with this cargo to Genoa?

A. No, sir.

Q. What did she do with it?

A. She unloaded the cargo on lighters.

Q. With your approval or permission?

A. With our protest.

Q. Was the lumber ever forwarded to Genoa?

A. No, sir.

Q. Was it abandoned here?

A. Fully abandoned, practically abandoned, according to their own letters. They had nothing to do with it. That is their own statement, the agent of the ship.

Q. And what did become of it finally?

A. It was finally sold.

Q. Under what circumstances?

A. Without prejudice to the shippers nor the holders of the bills of lading as a necessity."

The letters and wires show that the charterers protested and stated that if the schooner persisted in discharging "We will have no alternative but to hold the schooner and or owners liable for any damages we may suffer", while the purpose of the schooner to abandon was evidenced by the managing owner's notice to Rosasco Brothers, viz.:

"This is to advise you that the cargo of lumber, also the rosin, is now on lighters in the port of Philadelphia, and we wish to put ourselves on record to

this effect. We do not own the cargo, have no interest in same whatever, and therefore have no insurable interest, so should there by any loss by fire or marine risk, we will have nothing whatever to do with it or accept any responsibility."

It will thus be seen that the charterers did not accept a return of the cargo but against protest took it because of its discharge and abandonment by the schooner. Under such circumstances they were justified in disposing of it in diminution of damages. And that such was the logic of the situation seems to have been recognized by all parties, who agreed that sale should be made without prejudice, as will appear by the further testimony of William T. Rosasco:

"Q. I understand you were asked about the sale of this lumber to Felin & Company. Under what circumstances and why did you make that sale?

A. Well, there was a necessity of selling it. In a few words it was the necessity of selling it.

Q. Well, did you accept the lumber here?

A. Not at all.

Q. What was done with it?

A. It was loaded by the ship owner.

Q. What did the ship owner do with it?

A. The ship discharged it on lighters and notified us they would have nothing more to do with it, abandoned the cargo.

Q. And after they had notified you they would have nothing more to do with it, then what did you do?

A. Well, then we decided to proceed and see if we could sell it.

Q. Did you have any interviews with anybody on that subject?

A. Only with you in your office.

Q. And who was present at an interview on that subject?

A. Oh, before the cargo was sold we had a conference with the ship owner and Mr. Cummins and Mr. Long to lay the matter before them, at your office.

Q. Who were there?

A. Mr. Long and Mr. Cummins and Mr. MacDonald, the ship owner, and Mr. Yocum.

Q. And at that conference was the sale of this lumber discussed?

A. Fully discussed and the best offers exhibited to the meeting there.

Q. Was there any arrangement entered into then about this sale or how it should be sold?

A. Well, the arrangement was that it should be without prejudice to the interests or rights of the shippers or the holders of the bills of lading.

Q. And after that conference this lumber was sold?

A. Yes, some days afterward. I don't remember exactly the date."

Seeing then that the schooner wrongfully and purposely deviated from her course and as a result thereof became unable to and did not complete her voyage and that the charterers stood upon, protested and have never waived or surrendered their rights, we think libellant was entitled to have damages assessed on the basis of what the charterers' situation would have been had the charter been carried out and the cargo delivered at Genoa. In that case the charterers would have been at the expense of the freight charges and insurance and, having already paid these charges, they would be entitled to receive their cargo at Genoa. For these reasons we affirm in amount, as of the date of the going down of the mandate of this Court, the decree below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUPREME COURT OF THE UNITED STATES.

REPUBLIC OF FRANCE, COMPAGNIE FRANCO-INDO-CHINOISE and ENGINEERING TIMBER COMPANY, LTD.,
Petitioners,
(Claimants-Appellees below),
against
FRENCH OVERSEAS CORPORATION, as owner of the schooner *Malcolm Baxter, Jr.*,
Respondent,
(Petitioner-Appellant below).

IN THE MATTER
of
The Petition of the FRENCH OVERSEAS CORPORATION, as owner of the schooner *Malcolm Baxter, Jr.*, for limitation of liability.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are summarized in the petition.

FIRST POINT

THE DECISION OF THE CIRCUIT COURT OF APPEALS HEREIN IS CONTRARY TO THE WEIGHT OF AUTHORITY, INCLUDING THE DECISIONS OF THIS COURT, IN RESPECT TO THE EFFECT OF A BREACH OF WARRANTY OF SEAWORTHINESS ON THE SPECIAL CONTRACT OF THE BILL OF LADING.

The Circuit Court of Appeals ignored the inescapable consequences of the breach of the warranty of seaworthiness of the *Malcolm Baxter, Jr.*, by her owner.

The owner's warranty of seaworthiness, and his obligation to furnish a vessel ready and *able* to perform the voyage, is absolute and is of the very essence of every contract of affreightment. *The Tornado*, 1883, 108 U. S. 342, 349; *The Edwin I. Morrison*, 1894, 153 U. S. 199, 210.

No obligation is viewed more rigidly by the law than this obligation to furnish a vessel which is seaworthy *and capable of performing the voyage.*

An inexcusable breach of that obligation must result in the shipowner's fullest responsibility, for he has broken the most essential term of his contract.

In the case at bar, the Circuit Court of Appeals affirmed the finding that the shipowner was guilty of an inexcusable breach of the warranty of seaworthiness. Yet that Court has not only permitted the shipowner to escape responsibility for the greater part of the damages sustained by the cargo, but has permitted the shipowner to retain over $100,000 of freight which was prepaid in consideration of

the warranty of seaworthiness, and which the shipowner never actually earned.

Under American law, freight is not earned until the vessel makes delivery at destination. If the freight has been prepaid, it must be returned by the shipowner, in the event of failure to make delivery, *unless* the parties have consented to a special provision in the bill of lading that prepaid freight shall not be returnable in any event. *Caze* v. *Baltimore Ins. Co.* (1813), 7 Cranch 358; *National Steam Nav. Co.* v. *International Paper Co.* (1917 C. C. A. 2nd Circ.), 241 Fed. 861; *Burn Line, Ltd.* v. *U. S. & A. Steamship Co.* (1908, C. C. A. 2nd Circ.), 162 Fed. 298.

A shipowner's only right to a retention of prepaid freight must depend upon a special provision in the contract of affreightment; and it is obvious that a cargo owner, when consenting to such a special provision in the contract of affreightment, does so in reliance upon the shipowner's warranty of seaworthiness of the vessel, which is so rigidly enforced by maritime law, as correctly stated by the District Court (R. *fol.* 934).

The shipowner's warranty of seaworthiness is of the very essence of the contract of affreightment.

Indeed, it seems to be settled law in England that where a vessel is unseaworthy all clauses limiting the full liability of the shipowner for the consequences of such unseaworthiness go by the board. *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus & Co.* [1922] 2 A. C. 250, 257, 260, 261; *Tattersall* v. *National S. S. Co.* (1884), 12 Q. B. D. 297; *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* [1908] 2 K. B. 626, 632; *Wiener & Co.* v. *Wilsons, etc. Line* (1910), 15 Com. Cas. 294.

As Lord Sumner said in *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus & Co.* [1922] 2 A. C. 250, at page 260:

> "The shipowners' general liability in respect of damage due to the ship's unseaworthiness, accordingly, remains where the law places it. Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case.
>
> This principle of construction has not been confined to excepted causes of loss; it has been extended to provisions which limit the amount to be paid in satisfaction of the loss, for these equally, though in another way, limit *pro tanto* the shipowners' liability. There is no difference in principle between words which save them from having to pay at all and words which save them from paying as much as they would otherwise have had to pay."

It seems to be perfectly clear that a provision for the retention of prepaid freight should be dealt with on the same basis as any other limitation of liability in favor of the shipowner.

If, therefore, a shipowner is guilty at the outset of an inexcusable breach of his warranty of seaworthiness, and has broken one of the most essential obligations placed upon him by the contract, it is, on the face of it, unjust to permit him to enforce against the cargo a *special*

provision of the contract for the retention of the prepaid freight,—the freight never having been actually earned by carriage of the cargo.

In *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 1919, 248 U. S. 377, this Court at page 386, expressly pointed out that the shipowner had fulfilled all of his obligations; that there was no imputation of bad faith on his part; and that the inability to perform the voyage was in no way traceable to any failure of the shipowner.

The inference is that, if the shipowner had failed to furnish a seaworthy vessel, capable of performing the voyage, this court, in the case cited above, would not have permitted him to assert in his own favor the special terms in the contract of affreightment, for the retention of prepaid freight which the vessel had not, in fact, earned.

SECOND POINT

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HELD THAT THE ADVENTURE WAS FRUSTRATED BY THE GOVERNMENTAL EMBARGO.

The Circuit Court of Appeals apparently was of the opinion that the Governmental embargo of September 28th, 1917, did not actually become effective as to the *Malcolm Baxter, Jr.*, until she had made her repairs, and was ready to sail from Havana on January 14th, 1918 (R. pp. 1170-1).

In that view of the case, the Circuit Court of Appeals considered that, when the schooner *became* ready and able to continue the voyage *from Havana* on January 14th, 1918,

she was prevented from doing so by the Governmental embargo, which had rendered the voyage illegal (R. p. 1170).

Your petitioners respectfully submit that the Circuit Court of Appeals committed serious error in that interpretation of the law applicable to a defense of "frustration".

This defense is equitable in nature, as Judge Hough pointed out in *Texas Company* v. *Hogarth*, 1919, 265 Fed. 375, p. 378; affirmed, C. C. A. 2nd Circ. 1920, 267 Fed. 1023; 1921, 256 U. S. 619.

An essential requirement is that the party invoking the defense shall come before the court with clean hands, and show that he was in all respects ready, *able*, and willing to perform his contract at the time of the alleged frustration.

This court in *Texas Co.* v. *Hogarth*, 1921, 256 U. S. 619, pointed out on page 629, that the doctrine of frustration comes into effect,

> "if, before the time for performance and without the default of either party, the particular thing ceases to exist, or be available for the purpose."

To the same effect is *The Isle of Mull*, C. C. A. 4th Circ., 1921, 278 Fed. 131, 134.

If, as this Court said in *The Texas Co.* v. *Hogarth*, *supra*, the alleged frustration must come into effect "before the time for the performance," the Circuit Court of Appeals in this case erred in considering the question as though the time for the performance did not commence until the *Malcolm Baxter, Jr.*, finished her repairs at Havana, on January 14th, 1918.

The cargo owners did not contract for a voyage from Havana beginning January 14th, 1918. They contracted for the voyage commencing at New Orleans, in August, 1917.

Insofar as the Governmental embargo became of any effect, that effect must be considered as of the date of the embargo, September 28th, 1917. As the District Court found, *at no time prior to September 28th, 1917, was the Malcolm Baxter, Jr., able and ready to perform the contracted voyage* (R. fols. 933-4).

The decision of the Circuit Court of Appeals, in effect, is to permit the shipowner to escape liability on the ground that the embargo of September 28th impaired or destroyed the shipowner's INABILITY to perform.

Obviously, if the vessel had been ready and able to perform when she lawfully cleared from New Orleans, on August 16th, 1917, she would not have put into either Key West or Havana. She would have been well across the Atlantic by September 28th, and never would have been affected by the embargo of that date.

The Circuit Court of Appeals has erred in its failure to recognize that everything which occurred up to the redelivery of the cargo at New York was the direct result of the shipowner's inexcusable breach of the most essential term of the contracts of carriage; and has erred in permitting the shipowner to escape, in greater part, the consequences of his wrong.

The Circuit Court of Appeals, in holding that the Governmental embargo of September 28th, 1917, was the effective cause of the frustration of the voyage, and that the shipowner is not liable for the damages resulting from that frustration, lost sight of the fact that the shipowner's breach of warranty of seaworthiness was the proximate continuing cause of all of the damages sustained by the cargo, as the District Judge held (R. fols. 935, 936).

Although, as the Circuit Court of Appeals held, the embargo was not the *result* of the unseaworthiness, the *effect* of the embargo was due solely to the vessel's breach of warranty. The embargo "was a barrier which she herself wrongfully raised and which therefore she cannot set up as an excuse for non-compliance with" her obligation. *The Henry W. Cramp*, Appendix to Petition, *supra*, p. 27.

THIRD POINT

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HELD THAT THE SCHOONER *Malcolm Baxter, Jr.*, WAS NOT GUILTY OF A DEVIATION.

The law as to deviation is important in this case, because if the schooner *Malcolm Baxter, Jr.*, and her owner were guilty of a deviation, the contracts of carriage were then vitiated, and the schooner and her owner became insurers as to all subsequent losses by the cargo. *The Sarnia*, C. C. A., 2nd C., 1921, 278 Fed. 459, 463; *Lawrence* v. *Minturn*, 17 How. 111; *Mobile etc. R. R. Co.* v. *Jurey*, 111 U. S. 584; *Gibaud* v. *Great Eastern Ry. Co.* [1921] 2 K. B. 426, 431, 435; *Thorley* v. *Orchis S. S. Co.* [1907] 1 K. B. 660.

The ship and her owner, being then unable to rely on any clauses in the bills of lading, would be responsible to the cargo for all of the damages for failure to deliver at destination, including the return of the prepaid freight, as the District Court held (R. fol. 936).

The decision of the Circuit Court of Appeals is directly contrary to decisions of this court. *The Willdomino* (1927), 272 U. S. 718; *St. Johns N. F. Shipping Corp.* v. *Companhia Geral Commercial do Rio De Janeiro* (1923), 263 U. S. 119, and is probably contrary to the principles of the English decisions.

It is in direct conflict with the principles announced by the Circuit Court of Appeals for the Third Circuit in a recent and as yet unreported case, *The Henry W. Cramp* v. *Rosasco*, which is printed and annexed as an appendix to the Petition herein.

Your petitioners submit that the decision of the Circuit Court of Appeals that the *Malcolm Baxter, Jr.*, and her owner were not guilty of deviation in this case is contrary to the rule of law announced by this court in the case of *The Willdomino* (1927), 272 U. S. 718, 727.

In that case, this court expressly stated that;

> "an emergency sufficient to excuse a departure cannot arise out of * * * gross negligence."

In the case at bar, all the difficulties which arose after the vessel broke ground at New Orleans, and which interrupted the completion of the contract voyage, were the direct result of the shipowner's negligence in failing to

make any attempt to discover and remedy the vessel's defective condition, which, as both courts held, was discoverable.

The shipowner, as the undisputed evidence shows, merely shut his eyes to the condition of the vessel, and did not make the slightest effort to ascertain her condition.

It is submitted such conduct falls squarely within the term "gross negligence", as used by this court in *The Willdomino* case, *supra*.

In *The Willdomino* case, the unseaworthiness of the vessel consisted in an insufficient supply of fuel. In the case at bar, the unseaworthiness of the vessel consisted in structural defects and weaknesses, which existed before the voyage commenced, which could have been discovered, if anyone had looked for them, and which were not discovered solely because the shipowner made no examination of the vessel, and shut his eyes to her condition.

The Circuit Court of Appeals has asserted that there is a distinction between these two cases, insofar as the rule of deviation is concerned (R. p. 1170).

Your petitioners respectfully submit that the distinction asserted by the Circuit Court of Appeals is unsound.

There cannot be any difference in fact or in law between a case where a shipowner permits his vessel to leave port, incapable of performing a voyage because of insufficient fuel, and a case where the shipowner permits his vessel to leave port incapable of performing the voyage because of structural defects, which were discoverable by the exercise of due diligence.

In *both* cases, the subsequent departure from the voyage, either to replenish the insufficient fuel supply or to remedy the vessel's defective condition, *is the direct result of the owner's gross negligence.*

Furthermore, in considering the application of the rule of deviation to the case at bar, the Circuit Court of Appeals erroneously considered deviation as being merely a physical departure from the course of the contract voyage. The Circuit Court of Appeals lost sight of the fact that a "deviation" is an unjustifiable failure of a shipowner to perform the contracted voyage, and may arise not only from a physical departure from the course of a voyage, but also from other causes, such as unreasonable delay, *or from the failure of a shipowner to furnish a vessel capable of performing and ready to perform the voyage. The St. Paul* (1921), 277 Fed. 99, 107; *The Citta di Messina* (1909), 169 Fed. 472.

Thus, as this Court has held in *St. Johns N. F. Shipping Corporation, Owner, etc.* v. *S. A. Companhia Geral Commercial do Rio de Janeiro* (1923), 263 U. S. 119, exceptions clauses in bills of lading are set aside when cargo is shipped under a clean bill of lading on deck and is jettisoned during a storm, for the reason that a clean bill of lading amounts to a positive representation by the ship that the goods are under deck and will be so carried. After giving such a bill of lading, their stowage on deck constitutes a deviation from the contract of carriage.

Mr. Justice McReynolds, in that case said, at page 124:

> "By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had

been agreed and thereby directly caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit, and must account for the value at destination."

In the case at bar, the deviation consisted not only in the vessel's putting into Key West and Havana, but primarily in that, when she loaded her cargo and broke ground for the voyage, she was actually incapable of performing it.

Moreover, the Circuit Court of Appeals, in considering the question of deviation, erred in its conclusion that a physical departure from the course of the voyage would not constitute a deviation, unless it was *intended* when the voyage commenced.

Intent at the commencement of the voyage is not an essential element of deviation.

It seems clear, from the language of this court in the case of *The Willdomino*, that there may be a deviation, as a result of the owner's gross negligence, entirely without the existence of any actual intent at the commencement of the voyage.

LAST POINT

THE PRAYER OF THE PETITIONERS SHOULD BE GRANTED.

Your petitioners respectfully submit that the final determination by this Court of the questions of law involved in this case is of the utmost importance to the rights

of owners of vessels and cargoes engaged in waterborne commerce.

The decision of the Circuit Court of Appeals herein is not only contrary to the law, as announced by this Court in its earlier decisions, but is contrary to the sound principles of the established maritime law of this country.

Unless the errors in that decision be corrected by this Court, the effect will be to create regrettable confusion regarding questions of law which are of the utmost importance in every contract of affreightment.

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